IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12/12/2002

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THE HONOURABLE MR.JUSTICE V.KANAGARAJ

CRIMINAL APPEAL NO.263 of 1997

J.Alphonse .. Appellant

-Vs-

State rep. by the Superintendent
of Central Excise and Customs
Preventive Unit,
Tuticorin. .. Respondent

Criminal Appeal is directed against the judgment dated 27.2.1996 rendered in C.C.No. 283 of 1993 by the Court of Special Sessions Judge, (E.C.Act Cases) Madurai, as stated therein.

!For appellant : Mr.Soundar Vijay Arun Ram for
Mr.R.C.Paul Kanagaraj

^For respondent : Mr.N.P.Kumar, Special Public Prosecutor.

:JUDGMENT
This Criminal Appeal is directed against the judgment dated 27.2.199 6 rendered in C.C.No.283 of 1993 by the Court of Special Sessions Judge, (E.C.Act Cases), Madurai, thereby convicting the appellant for an offence punishable under Sections 8(c) r/w 18 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'NDPS Act'), sentencing him to undergo 10 years R.I. and to pay a fine of Rs.1 lakh and in default, to undergo a further R.I. for a period of three years.

2. The charge against the accused as framed by the trial Court is that firstly the appellant/accused, joining hands with two others, entered into a conspiracy to transport 'Abin' worth Rs.2,35,000/- in a car and hence they are punishable under Section 29 of the NDPS Act. Secondly the appellant/accused, having been in possession of 'Abin' weighing 47 Kgs. without any valid permit or licence, in order to export the same from India and transporting the same in India from one place to another having indulged in all acts for exporting the said contraband 'Abin', had become liable for being tried and punished under Sections 23 and 30 of the NDPS Act and also under Section 135A of the Customs Act.

3. The trial Court, having framed the above charges, had conducted an

elaborate trial permitting the parties to record their evidence. On the part of the prosecution, 8 witnesses have been examined as P. Ws. 1 to 8, besides marking 27 documents as Exs.P.1 to P.27 and 15 materials objects have been also marked as M.Os.1 to 15 and on the part of the defence, one witness has been examined as D.W.1 and one document has been marked as Ex.D.1.

4. With the above evidence having been placed on record, the trial Court, in its judgment, has arrived at the conclusion to hold the appellant/accused guilty of the offences under Sections 8(c) r/w 18 of the NDPS Act and has convicted and sentenced him in the manner aforementioned. It is only testifying the validity of this judgment dated 27.2.1996 passed by the Court of Special Sessions Judge (E.C.Act Cases), Madurai, the appellant has come forward to prefer the above appeal on certain grounds as pleaded in the grounds of appeal.

5. Before going into the merits of the case, it has become incumbent on the part of this Court to mention that it is the definite case of the prosecution as per the charge that the above appellant/accused, joining hands with two others, has indulged in transporting the contraband from one place to another, inside India, being in possession of the contraband ‘Abin’ having made all arrangements to export the same from out of India and hence the charge against them for the commission of offence punishable under Sections 29, 8(c) r/w 18, 23 and 30 of the NDPS Act and under section 135A of the Customs Act.

6. Today, when the above matter has been taken up for consideration in the presence of the learned counsel for the appellant and the learned Special Public Prosecutor appearing on behalf of the respondent/State, in consideration of the facts and circumstances brought forth on either side and upon hearing the learned counsel for both, what comes to be known is that the charge speaks of the seizure of the contraband, viz., 'Abin' which is not an item prohibited as per the NDPS Act, and therefore, technically, the offence cannot be brought straight under the purview of the NDPS Act. The trial court, thoughtless of this anomaly that has occurred in the case, particularly in the charge and without offering any explanation or questioning the prosecution regarding the actual English term of the contraband or the components and character of the same, under the impression that 'Abin' is also a prohibited item under the NDPS Act, has not only convicted, but also sentenced the accused in the manner extracted supra.

7. During arguments, learned Special Public Prosecutor would be emphatic in his version stating that the 'Abin' seized from the appellant and others is nothing but 'Opium', and therefore, this Court should take it into consideration and treating that 'Abin' is 'Opium', should confirm the conviction and sentence as passed by the trial court, as per its judgment dated 27.2.1996, against which, the appeal has been preferred not only on this point, but also in consideration of the evidence placed on record in the whole of the case.

8. Even though Section 391 of the Criminal Procedure Code provides for any appellate court, if it thinks necessary that additional evidence is to be recorded on its own reasons, takes such an evidence itself, still, option is given also to direct the same to be taken by the Court of Sessions or a Magistrate, which is not mandatory, but recommendatory in nature.

9. In fact, without such additional evidence being recorded, simply giving expression or taking into consideration some literal or dictionary meaning, 'Abin' cannot be so easily construed or taken for ' Opium', particularly the variety of the 'Abin' that is alleged to have been seized by the prosecution in the case in hand. Moreover, the Sessions Court, which tried the offence, since being better apprised of the facts and circumstances of the case, the demeanour of the witnesses, is the right Court to deal with and record additional evidence, in appreciation of which, should pass its judgment ultimately on facts and circumstances and in accordance with law.

10. In the above circumstances, this Court is left with no choice but to set aside the judgment of the lower court and to remand the case for recording additional evidence on the above point and to decide the matter ultimately.

In result,
(i) the judgment dated 27.2.1996 rendered in C.C.No.283 of 1993 by the Court of Special Sessions Judge, (E.C. Act Cases), Madurai, is hereby set aside;

(ii) the case is remanded to the trial court for recording additional evidence on the point of the seized contraband as aforementioned and to decide the case ultimately in consideration of the entire facts and circumstances and the evidence already recorded, in accordance with law;

(iii) since it is a long pending matter, the trial court is further directed to observe all the procedures contemplated by law in the above circumstances and to deliver the judgment within six months from the date of receipt of a copy of this judgment; and

(iv) as it is a continuous process, so far as the accused/convict is concerned, he shall continue as a remand prisoner,
gs.
V. KANAGARAJ, J.

pending trial, till such time that either his application seeking bail is considered or a finality of decision is made in the subject matter on judgment; and therefore, question of release of the appellant/accused, because of this remand, does not arise at all.

The above criminal appeal is disposed of in the above manner.

Index:Yes
Internet:Yes

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To
1. The Special Sessions Judge,
(E.C.Act Cases) Madurai.

2. The Judicial Magistrate No.II,
Tuticorin.

3. - do Thro' the Chief Judicial Magistrate,
Tuticorin.

4. The Superintendent,
Central Prison,
Palayamkottai.

5. The Special Public Prosecutor,
High Court, Chennai.